



Original: English

No.: ICC-01/04-01/06

Date: 12 August 2009

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public

Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"

Source: Office of the Prosecutor

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Introduction

1. The Prosecution hereby seeks leave to appeal Trial Chamber I's 14 July 2009 "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (hereinafter, the "Decision").¹ Judge Fulford dissented.² The possible recharacterisation, according to the Majority, is not confined to "the facts and circumstances described in the charges and any amendments to the charges".³ Instead, the Majority concludes that Regulation 55(2) and (3) permits it to change, or add new, charges in the pending case - even if those changed or new charges are based on facts elicited for the first time at trial, and that were never pleaded by the Prosecution or presented to or considered by the Pre-Trial Chamber.

2. The Majority reasoned that Regulation 55, titled "Authority of the Chamber to modify the legal characterisation of facts", sets out the authority of the Chamber "in relation to two distinct stages".⁴ Regulation 55(1) authorizes a Trial Chamber in the final judgment to change the legal characterisation of the facts, so long as the recharacterisation does not exceed the facts and circumstances described in the original or subsequently amended charges. But the Majority held that "[t]he powers conferred on the Chamber pursuant [to] Regulation 55(1) are distinct from the powers conferred by Regulation 55(2)".⁵ Under the latter provision, the Majority held that recharacterisation can be contemplated "at any time during the trial" and it need not be restricted to the facts and circumstances set out in the charging document.⁶

3. The Decision misinterprets the application and purpose of Regulation 55 and the relationship between its sub-parts. Rather than establishing two separate regimes for modifying the legal characterisation of facts, the Regulation authorizes the Trial Chamber to issue a final judgment that may recharacterise previously-pleaded facts if those facts ultimately establish the elements of another crime or another mode of liability. Sub-regulation (1) states the principle, sub-regulation (2) sets out the procedure, and sub-regulation (3) particularly addresses the fair notice and fair trial rights of the Accused to respond to these new charges.

¹ ICC-01/04-01/06-2049.

² ICC-01/04-01/06-2069-Anx1, 31 July 2009.

³ Decision, paras. 27-32.

⁴ Decision, para. 27.

⁵ Decision, para. 29.

⁶ Decision, para. 28.

4. The Majority's interpretation, is inconsistent with Article 74(2), which expressly provides that "[t]he Trial Chamber's decision [...] shall not exceed the facts and circumstances described in the charges and any amendments to the charges." Moreover, the issue impacts on fairness of the proceeding and the appearance of fairness. Impartiality and appearance of impartiality will be affected if the same judges both define the charges and take a final decision on these same charges. At the same time, the Majority Decision intrudes on the Prosecutor's role and responsibilities, including the possibility to seek an amendment of the charges, and affects the Accused's rights to a fair trial.
5. Immediate intervention by the Appeals Chamber is needed to clarify the correct interpretation of Regulation 55 to prevent a delay of the trial based on a wrong legal interpretation.

Procedural Background

6. An arrest warrant was issued against the Accused on 10 February 2006 charging that the Accused enlisted and conscripted children under the age of 15 and used them to participate actively in hostilities.⁷ The Accused first appeared before the Court on 20 March 2006.⁸ The Prosecution filed its Document Containing the Charges on 28 August 2006.⁹
7. On 29 January 2007, the Pre-Trial Chamber confirmed six counts alleging crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.¹⁰ Based on the Confirmation Decision, the Prosecution filed an amended Document Containing the Charges on 22 December 2008.¹¹
8. The trial of the Accused in relation to these charges commenced on 26 January 2009. During the Prosecution's case, 30 witnesses testified.¹² On 14 July 2009, the final witness in the Prosecution's case completed her testimony.¹³
9. On 22 May 2009, the Legal Representatives of the victims asked the Trial Chamber to consider a legal recharacterisation of the facts to encompass the offenses of

⁷ ICC-01/04-01/06-2-tEN.

⁸ ICC-01/04-01/06-T-3-EN ET, pp. 6-7.

⁹ ICC-01/04-01/06-356.

¹⁰ ICC-01/04-01/06-803, pp. 156-157.

¹¹ ICC-01/04-01/06-1571-Conf-Anx.

¹² The Prosecution called 28 witnesses, and the Trial Chamber called two expert witnesses.

¹³ ICC-01/04-01/06-T-209-CONF-ENG ET.

sexual slavery (Articles 7(1)(g), 8(2)(b)(xxii), and/or 8(2)(e)(vi)) and inhuman and cruel treatment (Articles 8(2)(a)(ii) and/or 8(2)(c)(i)).¹⁴

10. On 29 May the Prosecution filed a response whereby it reserved its position on the Legal Representatives' Request, and suggested that, under Regulation 55, the Chamber should determine the feasibility of recharacterisation before soliciting submissions.¹⁵
11. Pursuant to a request of the Trial Chamber, the Prosecution provided further observations on 12 June.¹⁶ In those observations, the Prosecution cited the requirements of Regulation 55, including the fact that any modification to the legal characterisation of the facts must not exceed the facts and circumstances pleaded in the Document Containing the Charges,¹⁷ and also set out factors that the Chamber could consider in determining whether recharacterisation was a reasonable possibility in this case.¹⁸
12. On 19 June the Defence opposed the Legal Representatives' Request on multiple grounds,¹⁹ urging that the Chamber could not add charges predicated on facts that were not contained in the original charging document and that the possibility of recharacterising the facts would be unfair to the Accused.
13. On 14 July, Trial Chamber I issued a Decision on the Legal Representatives' Request.²⁰ The Majority concluded that at this stage of proceedings it could consider the possibility of recharacterisation of facts under Regulation 55(2) without being bound by the facts and circumstances set out in the original charging materials. Instead, it considered that it may expand the factual allegations, so long as it gives notice to the parties, solicits submissions, and – in accordance with Regulation 55(3) – allows measures to protect the rights of the accused to defend against the new charges.
14. The Decision gave notice to the parties and participants that the Majority of the Chamber concluded that it was possible to change the legal recharacterisation of the facts.²¹ It did not further elaborate or identify the facts that it considered might be subject to recharacterisation. It explained that “[a]t an appropriate stage of the

¹⁴ ICC-01/04-01/06-1891.

¹⁵ ICC-01/04-01/06-1918.

¹⁶ ICC-01/04-01/06-1966.

¹⁷ ICC-01/04-01/06-1966, paras. 6, 8.

¹⁸ ICC-01/04-01/06-1966, paras. 6, 9-19.

¹⁹ ICC-01/04-01/06-1975.

²⁰ ICC-01/04-01/06-2049 (“the Decision”).

²¹ Decision, para. 33.

proceedings the defence, the prosecution and the victims' legal representatives shall be given the opportunity to make oral or written submissions according to Regulation 55(2). In due course, the Trial Chamber will articulate the procedural steps for a hearing to take place to consider all matters relevant to the possible modification.”²²

15. Judge Fulford dissented.²³ In his Minority Opinion, Judge Fulford stated that Regulation 55 authorised the Trial Chamber “to modify only those facts and circumstances that were set out in the Document Containing the Charges, as confirmed by the Pre-Trial Chamber”.²⁴ Judge Fulford considered that Regulation 55 contains a single procedure, in which the power to recharacterise the facts at the end of trial, in paragraph (1), is qualified by the safeguards set out in paragraphs (2) and (3).²⁵ Judge Fulford also considered Regulation 55 to be further circumscribed by Article 61(9), pursuant to which amendment, substitution or addition of charges is exclusively a function of the Pre-Trial Chamber, and that any modification of the legal characterisation of the charges under Regulation 55 must not constitute an amendment of those charges.²⁶ Judge Fulford concluded that the request of the Legal Representatives was in substance to add additional charges, rather than the change the legal characterisation of the facts, and that he would reject the request on that basis.²⁷
16. The Prosecution hereby seeks leave to appeal the Decision pursuant to Article 82(1)(d) and Rule 155.

The issue for which leave to appeal is sought fulfils the criteria in Article 82(1)(d)

17. This application seeks leave to appeal the following issue arising from the Decision:

Whether Regulation 55(2) and (3) create a separate regime, distinct from Regulation 55(1), and whether under those provisions a Trial Chamber may change the legal characterisation of the charges or add new charges

²² Decision, para. 34.

²³ ICC-01/04-01/06-2069-Anx1, 31 July 2009. The dissenting opinion was originally filed on 17 July 2009 (ICC-01/04-01/06-2054).

²⁴ Minority Opinion, para. 10; see also paras. 46-50.

²⁵ Minority Opinion, paras. 33, 53(i), see also paras. 21-31.

²⁶ Minority Opinion, paras. 12-17, 53(ii). Judge Fulford considered that the distinction between modifying the legal characterisation of facts and amending, adding or substituting a charge would have to be determined on a case-by-case basis – see paras. 18-20, 53(iii).

²⁷ Minority Opinion, paras. 34-45, 53(iv) and (v).

based on facts and circumstances that are not contained in the charging document but are established by the evidence at trial.

18. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.²⁸

The issue arises from the Decision

19. The Decision directly interprets Regulation 55(2) and (3) as authorizing the Trial Chamber to add or change charges that go beyond the facts and circumstances described in the Document Containing the Charges and upon which the confirmation decision is based. This issue of whether this interpretation is correct is “an identifiable subject or topic requiring a decision for its resolution”,²⁹ and the resolution of this question is “essential for the determination of matters arising under the judicial cause under examination”.³⁰ It therefore constitutes an issue arising from the Decision, for the purposes of Article 82(1)(d).

The issue affects the fair conduct of the proceedings

20. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial [...]; making its interpretation and application subject to internationally recognized human rights”.³¹ Fairly conducted proceedings pursue the truth in a manner that respects and does not unduly prejudice the rights of any party.
21. “Fairness”, within the terms of Article 82(1)(d), incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.³² In particular,

²⁸ *Situation in Uganda*, ICC-02/04-01/05-20, 19 August 2005, para. 22.

²⁹ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 9. The parties made submissions on this issue (Prosecution, ICC-01/04-01/06-1966, paras. 7-8, 11; Defence, ICC-01/04-01/06-1975, paras. 19-49).

³⁰ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 9. The notice given to the parties is based on unspecified facts which are not identified as falling within the Document Containing the Charges.

³¹ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 11.

³² See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.³³

22. This issue significantly affects the fairness of the proceeding. It determines that the Accused may be tried and convicted on criminal charges based on facts that were not presented in the charging document or considered by the Pre-Trial Chamber at the confirmation hearing. The principle that a judgment may not extend beyond the factual parameters of the charges is a fundamental aspect of the fairness of the legal process.³⁴ The Statute reflects this, with Article 74(2) clearly stating that “[t]he Trial Chamber’s decision [...] shall not exceed the facts and circumstances described in the charges and any amendments to the charges” – a provision which has been described as “important, though perfectly classic”.³⁵ Regardless of whether the Majority decision is ultimately judged to be correct or incorrect, the issue affects the rights and obligations of the Prosecution, the Defence, the victims, and the witnesses alike.
23. The parties and all other participants have been preparing for trial, and the trial is half-way completed, based on the facts set out in the charges the Prosecution filed three years ago and the Pre-Trial Chamber confirmed.³⁶ But with the Majority’s Decision, the parties and participants may not yet know the factual parameters of

³³ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

³⁴ For example, Javier Llobet Rodríguez has explained that a lack of correlation between charges and judgement is a violation of the principle of due process of law; and that the charges brought by the public prosecution (and, where applicable, any widening of the charges) represent the factual boundaries for the judgment (*Proceso Penal Comentado*, San Jose, CR, 1998, p. 727; commenting on Article 365 of the Costa Rican Code of Criminal Procedure which provides that “*The judgement may not deem as proven other facts or circumstances than those described in the charges [...] or, if applicable, in any amendment to the charges, except when they favour the accused*”). Julio Maier has similarly explained that “The right to a fair hearing [...] would be rendered meaningless if it wasn’t mandated that the judgment can only refer to the facts and circumstances contained in the charges, which have been notified to the accused, and therefore, to those elements of the charges in relation to which he or she has had the opportunity to be heard; this implies barring the judgment to extend to facts or circumstances not contained in the process, what guarantees the right to a hearing (*ne est iudex ultra petita*).” (*Derecho Procesal Penal*, Buenos Aires, 1996, p. 568). Swiss law similarly considers the *Akkusationsprinzip*, and the closely related *Immutabilitätsprinzip*, to be issues of due process of law. Under the *Immutabilitätsprinzip*, the prosecution fixes the *Verfahrens-* (topic of procedure) and *Urteilsthema* (topic of judgment); and for the protection of the accused this must stay the same throughout the process (Hauser/Schweri/Hartmann, *Schweizerisches Strafprozessrecht*, Basel, 2005, pp. 225, 228). Even where the national systems or commentaries contemplate a judgment on facts that have been widened, the question of whether the facts can be expanded in this manner and at this stage of the proceedings goes to the merits and can only be decided by the Appeals Chamber. The issue undeniably impacts on fairness.

³⁵ Terrier, “Procedure before the Trial Chamber”, in Cassese (et al) (eds) *The Rome Statute of the ICC: a commentary* (2002), p. 1314.

³⁶ All aspects of the preparation of the case – including the participation of victims, the relevance of documents or information to the defence, and therefore decisions on redactions – are based on the scope of the case against the Accused. As the Appeals Chamber has ruled, “the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber’s authority to the determination of those issues.” – *Prosecutor v Lubanga*, ICC-01/04-01/06-1432 OA9 & 10, 11 July 2008, para. 63.

the case.³⁷ Such uncertainty impacts on their ability to effectively prepare for the rest of the trial.³⁸

24. The issue further impacts on fairness of the proceeding and the appearance of fairness. Impartiality and appearance of impartiality will be affected if the same judges, both define the charges and take a final decision on these same charges.³⁹ At the same time, the Majority Decision intrudes on the Prosecutor's role and ability "to exercise the powers and fulfil the duties"⁴⁰ allocated in the Statute, including seeking an amendment of the charges.⁴¹ Finally, the issue also affects the Accused's rights to a fair trial.

The issue affects the expeditious conduct of the proceedings

25. The issue in this Decision also separately affects the expeditious conduct of the trial.⁴² It will initiate a series of procedural steps⁴³ that will delay the progress of the trial. While some impact on the length of a trial may be inherent in any application of Regulation 55, the issue at hand has additional impacts on the expeditious conduct of the proceedings. The Prosecution has essentially rested its

³⁷ While the Majority "give[s] notice that the legal characterisation of facts may be subject to change" (Decision, para. 35), it gives no notice as to what these unspecified "facts" are.

³⁸ *Prosecutor v Kony et al.*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

³⁹ The judgment of the Trial Chamber "may not exceed the facts and circumstances described in the charges and any amendments to the charges. [...] The judges cannot themselves take cognizance of facts the Prosecutor has not pursued. In other words, the judge cannot be both judge and prosecutor." – Terrier, "Procedure before the Trial Chamber", in Cassese (et al) (eds) *The Rome Statute of the ICC: a commentary* (2002), p. 1314. The new factual charges also have not been reviewed or confirmed by the Pre-Trial Chamber.

⁴⁰ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

⁴¹ The discretion, and Statutory authority, of the Prosecution includes not only the drafting of the charges initially brought against the suspect, but also determining whether to seek an amendment of those charges – see Articles 61(7)(c)(ii) and 61(9).

⁴² While the Prosecution is conscious of this Chamber's jurisprudence that the requirements of impact on fairness and on expeditiousness are cumulative, it maintains its position that once a party has demonstrated that an issue affects the fair conduct of the proceedings, a further showing that the issue also affects its expeditious conduct is superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer "fair and expeditious"; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the "fair and expeditious conduct of the proceedings". The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al.*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

⁴³ Decision, para. 34.

case. In expanding the trial's factual basis, the Decision will require the parties to investigate, prepare and address incidents and events that were not pleaded.

26. In short, there is no doubt that the processes required by the Majority's Decision will delay the conclusion of these proceedings.
27. Finally, if the Trial Chamber, based on its interpretation of Regulation 55, ultimately were to convict the Accused on crimes that are not based on facts and circumstances pleaded in the charging document, there also is no doubt that the decision would be challenged on appeal, particularly since it would constitute a new development in the jurisprudence of the international criminal courts.
28. Given the certainty that (a) the Majority's interpretation, when implemented through notice that one or more new charges going beyond the facts pleaded and confirmed will be considered, will cause delay to the trial proceedings and (b) issues surrounding that interpretation will be raised on appeal later if not now, allowing the Appeals Chamber to decide the underlying legal issue at the outset will expedite both the trial and appellate proceedings.⁴⁴

The issue affects the outcome of the trial⁴⁵

29. The interpretation of Regulation 55 permits the Chamber to consider, and possibly to convict the Accused on, additional or alternative charges founded on facts which are not currently part of the case. Accordingly, in addition to affecting the fair and expeditious conduct of the proceedings, this issue will obviously also affect the outcome of the trial.

⁴⁴ Nor will the pendency of the appeal delay or interfere with the present trial processes: the defence is not expected to begin to present its case until October at the earliest; and in any event, as Judge Fulford notes the defence case could proceed even if an appeal was pending if the Appeals Chamber grants suspensive effect. See Minority Opinion, para. 54.

⁴⁵ The requirement that an issue affect the outcome of the trial is an alternative basis for granting under Article 82(1)(d) to the issue impacting on the fair and expeditious conduct of the proceedings (see e.g. ICC-01/04-01/06-1417, 2 July 2008, paras. 17-18; ICC-01/04-01/06-1473, 24 September 2008, paras. 21-22). In this instance, the issue impacts on both the fair and expeditious conduct of the proceedings and the outcome of the trial, and thus each provides an independent basis for granting leave to appeal.

**Immediate resolution of the issue by the Appeals Chamber will
materially advance the proceedings**

30. Finally, the Prosecution submits that immediate resolution of the issue will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁴⁶ The Appeals Chamber has also confirmed that the proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.”⁴⁷
31. An immediate and definitive interpretation of Regulation 55 will, in the language of the Appeals Chamber, “ensur[e] that proceedings follow the right course” and “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings and the outcome of the trial.”⁴⁸
32. As it stands, implementation of the Decision itself will delay the completion of this trial. If the Majority Decision is incorrect, immediate resolution of the issue by the Appeals Chamber may avoid recalling witnesses, presentation of new evidence, and inevitable delays. In contrast, granting leave to appeal this issue need not cause any substantial delay to proceedings.
33. If the Appeals Chamber endorses the rationale of the Majority, the Trial Chamber may proceed on firm foundations. If the Appeals Chamber rejects the rationale, the Trial Chamber may proceed without committing fundamental legal error that would require a corrective remedy on appeal.
34. In addition, the immediate resolution of this issue will advance all other cases before the Court.⁴⁹ Delay in this trial to permit the Defence to counter newly

⁴⁶ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁴⁷ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.

⁴⁸ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 19, 15.

⁴⁹ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it can be weighed in that decision. Pre-Trial Chamber II has recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” - *Situation in Uganda*, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

established charges will delay upcoming trials, because of limited availability of courtrooms and court services. A definitive ruling from the Appeals Chamber could prevent unnecessary and delaying litigation. It would also allow the parties, participants and Chambers to prepare, present and adjudicate their upcoming cases with greater ability to forecast the factual basis and scope of the charges.

Relief sought

35. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of August, 2009

At The Hague, The Netherlands